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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1548

IN RE: ESTATE OF PERRY CARLTON, Deceased,

ALBERTA CARLTON HAYES,
RUBY C. TEAGUE,
CHARLES H. CARLTON, *et al.*,
Petitioners,

v.

LUCY JANE CARLTON ROGERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, LUCY JANE CARLTON ROGERS, respectfully prays that this Court deny the petition for writ of certiorari, seeking review of the decisions of the Supreme Court of Florida in this case, reported at 378 So. 2d 1212 (1980).[1]

[1] In this brief, references to the Appendix to the Petition are designated [Pet. App. ___]. References to Respondent's Appendix are designated [A. ___].

JURISDICTION

Petitioners seek to invoke this Court's certiorari jurisdiction pursuant to 28 U.S.C. § 1257(3). Respondent submits that Petitioners have not specially set up or claimed a substantial federal question so as to permit them to seek review here. Their constitutional claim was not raised in timely fashion under Florida law, was not addressed below, and is insubstantial.

QUESTIONS PRESENTED

The "Questions Presented for Review" set forth in the Petition are not supported by the record. The facts of this case do not present a substantial federal question.

STATEMENT OF THE CASE

Respondent accepts Petitioners' Statement of the Case with the following additions and corrections:

1) Nothing in the record of this cause suggests that any Florida judge or justice was biased against Petitioners, or that there was any impropriety in the Florida appellate proceedings below;

2) B. A. Bittan, Jr., did not represent the Respondent, Mrs. Rogers, in the trial or appellate proceedings below, and his law firm has no interest in the resolution of this controversy [A.1];

3) Justice Ben Overton of the Florida Supreme Court did not assign Judges Robert P. Smith, Jr., and Warren H. Cobb to sit on the state's Fourth District Court of Appeal "to hear oral argument in [this] cause", as stated in the Petition. He assigned them to hear and determine whatever causes were presented to them during a three day period, two months following the dates of the assignments [Pet. App. 85-88];

4) Petitioners' assertion that "qualified judges of the Fourth District were available" to hear this case is not supported by the record;

5) Petitioners raised no objection in Florida's Fourth District Court of Appeal to any of the three judges on the panel which heard this case. They first complained about the temporary assignments of Judges Smith and Cobb in their Suggestion for Disqualification of Justice of Supreme Court (hereafter "Suggestion"), filed nearly two and one-half years following oral argument in the Fourth District, and two years after that court's decision had become final with the denial of Petitioners' request for rehearing;

6) Petitioners' recitation concerning the holdings in *In re Hewett's Estate*, 153 Fla. 137, 13 So. 2d 904 (1943), and other cases merely represents as fact Petitioners' position on the ultimate state law issue in this case, a position rejected by Florida's appellate courts;

7) The certiorari jurisdiction of the Florida Supreme Court to resolve conflicts between appellate decisions is found in Article V, Section 3(b)(3), Florida Constitution, not Section 4;

8) The Florida Supreme Court did not depart from its modern practice in submitting Petitioners' Suggestion to Justice Overton for decision.

In addition to the Statement of the Case, other sections of the Petition contain inaccurate or misleading factual assertions. For ease and clarity of expression, such matter is addressed in the section of this Brief entitled "Reasons for Denying the Writ."

REASONS FOR DENYING THE WRIT

Petitioners have no legitimate basis for seeking to invoke this Court's jurisdiction. Having lost a case involving a pure issue of state law, they now attempt to create a federal question by attacking the processes and judges which produced the adverse ruling. On the basis of factual inferences which are not supported by the record, Petitioners contend they were denied due process because the Chief Justice of the Florida Supreme Court declined their untimely suggestion that he disqualify himself in this case. The actual facts of record present no substantial federal question, and the petition for certiorari should be denied.

I.

THE RECORD DOES NOT PRESENT THE FEDERAL QUESTIONS WHICH THE PETITION ATTEMPTS TO RAISE

The factual predicate for Petitioners' "Questions Presented for Review" consists exclusively of inferences which are not supported by the record, to wit:

1) that Respondent, Mrs. Rogers, was represented in the proceedings below by an attorney (B. A. Bittan, Jr.) who is a close friend of Justice Ben Overton of the Florida Supreme Court (Petitioners' Question One);

2) that Justice Overton, as Chief Justice,[2] assigned two judges to Florida's Fourth District Court of Appeal in order to "fix" that court's decision, and that he then frustrated Petitioners' attempt to secure review in the Florida Supreme Court (the "special circumstances" cited in Petitioners' Question One);

[2]The Florida Supreme Court elects its Chief Justice every two years. Rule 2.030, Florida Rules of Judicial Administration.

3) that the proceedings in the Florida Supreme Court in this case were unusual, departing from prior practice and "arbitrarily" depriving Petitioners of a state constitutional right to review (Petitioners' Question Two).

First, Mrs. Rogers has never been represented by Mr. Bittan in this case. In 1970, another member of his law firm filed a *pro forma* petition on her behalf, with the consents of a majority of the other heirs, seeking the appointment of a bank to administer the estate of Perry Carlton. Mrs. Rogers did not have need for further legal assistance concerning the estate until July, 1975, when Petitioners filed a pleading seeking to prevent her from inheriting her share. Mr. Bittan's partner, who had been representing the bank, assisted her in securing counsel.[3]

Neither Bittan's firm nor its client, the bank, participated in the Florida appellate proceedings in issue, nor were they financially interested in the result.[4] Indeed,

[3]The Suggestion for Disqualification was filed in the court below with twelve exhibits attached. Six are included in Petitioners' Appendix. The omitted exhibits contain the facts which are set forth in the text above, and from which Petitioners draw their inferences.

[4]Paragraph (n) of Petitioners' Suggestion for Disqualification states that Mr. Bittan "personally and actively participated in the representation of LUCY JANE CARLTON ROGERS and the FIRST NATIONAL BANK OF FORT PIERCE, Fort Pierce, Florida, as Administrator of the Estate of PERRY CARLTON, deceased, as shown by his sworn testimony given by deposition upon oral examination on the 1st day of February, 1979" [Pet. App. 76-77]. This is inaccurate. Mrs. Rogers was not mentioned during Mr. Bittan's deposition.

In his opinion declining to recuse himself, Justice Overton incorrectly described Mrs. Rogers as "the administrator of the estate in issue". Justice Overton was concerned primarily with the legal sufficiency of the Suggestion, rather than its factual basis, and he may have misinterpreted paragraph (n). Mrs. Rogers was never the administrator.

on the day of oral argument in the Florida Supreme Court, when Petitioners claim they learned of Justice Overton's friendship with Mr. Bittan, the latter's firm was no longer representing any party to the estate proceeding, having withdrawn as counsel for the bank some six months earlier. There is absolutely no basis for Petitioners' attempt to portray Bittan and his firm as Mrs. Rogers' lawyers, or as a surreptitious link with Justice Overton.

Petitioners' second inference—that Justice Overton prearranged the decision of the Fourth District Court of Appeal by hand-picking Judges Robert Smith and Warren Cobb to decide the case against them—is absolutely unwarranted. Temporary assignment of judges to other courts is routine in Florida, despite Petitioners' attempt to create the impression that the assignments in this case were irregular. *See* Rule 2.1a(3), (4), Florida Rules of Appellate Procedure, 1962 Revision (in effect at all times material hereto).

Nothing in the record suggests that Justice Overton has less integrity than the late Justice Glenn Terrell, whom Petitioners quote at length. There is no evidence warranting the inference that Justice Overton was biased against Petitioners, and their insinuation that he orchestrated a statewide judicial conspiracy to defeat them is scandalous and impertinent.[5]

Petitioners' third inference is that the proceedings in the Florida Supreme Court were somehow unusual. Petitioners portray the court's action on their Suggestion

[5]The Suggestion for Disqualification of Justice Overton is Petitioners' second such pleading in this cause. Previously, they requested the disqualification of the trial judge. He denied their request, subsequently ruled in their favor on the merits, and is now described in their Petition as "the able Probate Judge".

for Disqualification as an abrupt departure from prior practice, and characterize the court's refusal to take jurisdiction of this case as an "arbitrary disregard of a right granted by" the Florida Constitution [Petition p. 5].

Submitting the Suggestion to Justice Overton for decision was not a change in the court's procedure. Although the court stated in its January 10, 1980 opinion that it was "receding" from early decisions in which the non-challenged members of the court ruled on the legal sufficiency of such a request, an examination of the entire opinion reveals that the court's actions in this case followed its well-established modern practice and the practice of this Court [Pet. App. 106, 108].

Further, the Florida Supreme Court did not disregard any state constitutional right secured to Petitioners. They have no "constitutional right of review" in that tribunal, as they claim. The writ of certiorari in cases of direct conflict between Florida appellate decisions is discretionary. Article V, Section 3(b)(3), Florida Constitution; *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958).

Petitioners' characterization of this case as presenting a "clear-cut" and "patent" case of conflict jurisdiction merely states their position, and ignores the special meaning of the term "direct conflict" in Florida law. *See Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958); *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200 (Fla. 1976).

A majority of the court considers dictum in a prior decision an insufficient basis for the exercise of conflict certiorari jurisdiction. Justice Adkins disagrees, *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976), as he did in the case at bar [Pet. App. 51]. There is nothing arbitrary,

insidious or unusual in the court's decision not to take jurisdiction in this case. Three justices, whose qualifications Petitioners do not challenge, rejected their assertions of "patent" conflict.

The Florida Supreme Court has the ultimate authority to decide the extent of its jurisdiction and the appropriate occasions to exercise it. *See, e.g.*, the concurring opinion of Chief Justice White in *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181, 40 S. Ct. 116 (1919) ("the contention that a federal right was violated by the refusal of the [state] court to take jurisdiction is too unsubstantial and frivolous to give rise to a federal question").

In sum, the record does not contain the factual predicate Petitioners assert for their "Questions Presented for Review". Mr. Bittan was not "one of the attorneys in the case" before the Florida Supreme Court; the "special circumstances" of judicial impropriety and conspiracy are nonexistent; and the Florida Supreme Court did not by denying certiorari evince an "arbitrary disregard of a right guaranteed by the state constitution". Petitioners lost. That does not violate the Law of the Land.

II.

THE QUESTION PRESENTED BY THE PETITION AND SUGGESTION FOR DISQUALIFICATION WAS NOT TIMELY RAISED BELOW AND IS NOT SPECIALLY SET UP OR CLAIMED

Petitioners knew of the asserted ground for disqualification of Justice Overton on the day of oral argument in the Florida Supreme Court—a year before the court rendered its decision with Justice Overton's participation. They offer no explanation for waiting until after the decision to file their Suggestion for Disqualification. The Florida Supreme Court stressed the importance of timeliness in requesting disqualification in *Ball v. Yates*, 158 Fla. 521, 29 So. 2d 729 (1947), and Justice Overton properly concluded that Petitioners had waived the issue.

A failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the state has a legitimate interest in enforcing its procedural rule, *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564 (1965). Florida clearly has a legitimate interest in requiring that challenges to its judges be asserted before they participate in decisions, and Petitioners do not contend to the contrary, *see Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978), n.7. As Justice Overton pointed out in his opinion declining to recuse himself, any other rule gives the challenging party an unfair advantage:

> Allowing a party to request disqualification after a decision has been rendered by the Court provides a second opportunity to achieve a favorable result when the first decision is adverse, an opportunity not available to the opposing party. Because of these factors, this rule of law has been strictly enforced in situations where there is knowledge of

the ground for disqualification before a decision but the suggestion for disqualification is not filed until after the court's decision is rendered. [Pet. App. 116].

Thus, Petitioners' "federal question" was neither timely presented under state law nor addressed by the state court. It is therefore not "specially set up or claimed" so as to entitle Petitioners to invoke this Court's jurisdiction, 28 U.S.C. § 1257; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 40 S. Ct. 116 (1919); *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S. Ct. 98 (1932) (federal claim first raised by petition for rehearing in state supreme court cannot serve as basis for invoking this Court's jurisdiction).

In the case at bar, Petitioners waited until after they had filed their petition for rehearing in the Florida Supreme Court before raising their federal question. Having knowingly accepted the risk of Justice Overton's participation, they cannot now attack the result.

III.

NEITHER THE RECORD NOR THE DECISION BELOW PRESENTS A SUBSTANTIAL FEDERAL QUESTION APPROPRIATE FOR DECISION BY THIS COURT

The facts of this case present no federal question. Once the inferences, innuendos, and misstatements with which Petitioners attempt to supplement the record are discarded, little remains but their professed fear that Florida's appellate courts denied them a fair hearing. They offer no legal analysis to support a federal question, relying instead upon Canon 3(C)(1) of Florida's Code of Judicial Conduct. Their repeated mechanical references to "due process" and their Questions Presented are

wholly formal, and so completely devoid of merit as to be frivolous. Petitioners cannot obtain relief in this Court. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 23 S. Ct. 123 (1902).

In his written opinion declining to recuse himself, Justice Overton assumed the truth of Petitioners' contention that Mr. Bittan's firm represented Mrs. Rogers below. He did not address Petitioner's "due process" claim, but quoted from Advisory Opinion 11 of the Committee on the Code of Judicial Conduct for United States Judges, which concluded that friendship with an attorney whose firm represents a party does not disqualify a judge. If the Due Process Clause requires recusal in such cases, its standard must be more stringent than that of the Code. However, this proposition has been uniformly rejected by the authorities which have considered the question. *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S. Ct. 2641 (1977); *United States ex rel. Perry v. Cuyler*, 584 F.2d 644 (3d Cir. 1978), *cert. denied*, 440 U.S. 925, 99 S. Ct. 1257 (1979); *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. Chi. L. Rev. 236 (1978).

Apart from the absence of a substantial federal question in this case, Respondent submits that the general subject of judicial qualifications does not presently warrant constitutional adjudication. As Justice Overton pointed out, the suggestion that a judge or justice disqualify himself "presents a sensitive and difficult problem" [Pet. App. 113]. Perhaps for this reason, the cases in which this Court has found the Due Process Clause implicated by a judge's participation have been limited to situations where the judge has a personal or official pecuniary interest in the result, such as *Tumey v.*

Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927) (mayor-judge retained portion of fees collected from convictions), or where bias is obvious or practically unavoidable, as in *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S. Ct. 499 (1971) (judge who was "reviled by contemnor" could not preside in contempt proceedings). As this Court stated in *Tumey:*

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. 273 U.S. at 523.

Petitioners offer nothing to suggest that the matter of judicial qualifications suddenly demands increased constitutional scrutiny. Such an endeavor would present this Court with the difficult problems of ascertaining the true facts in each case, developing meaningful standards for general application to myriads of situations, and defining the relationships between the constitutional standards and the various versions of the Code of Judicial Conduct. It would inevitably increase the number of petitions filed by litigants simply dissatisfied with lower court decisions, as in the case at bar. In the absence of evidence that the state and federal codes of judicial conduct are not effective, no necessity is presented for the Court to enter this arena.

CONCLUSION

This case involved a difficult question of state law. The judges were divided, but Petitioners lost. There has been no infringement of their constitutional rights, no disqualifying relationships, and no judicial conspiracy. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

APPENDIX

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

Case No. 51,413

IN RE:
ESTATE OF PERRY CARLTON, Deceased

ALBERTA CARLTON HAYES, RUBY C. TEAGUE, CHARLES H. CARLTON, *et al.*,

Petitioners,

v.

LUCY JANE CARLTON ROGERS,

Respondent.

REPLY TO SUGGESTION FOR DISQUALIFICATION OF JUSTICE OF SUPREME COURT

The following is a brief reply to the Suggestion for Disqualification of Justice of Supreme Court:

1. I was hired in this cause by Lucy Rogers, and I am to be paid by Lucy Rogers. I personally have handled all legal work on this matter and have never discussed or had any contact whatsoever with Benjamin A. Bittan, Jr. of Fort Pierce, Florida.

2. The firm of Willes, Bittan & Willes has no interest financially or otherwise in this cause.

3. It should be noted that no objection to any of the Judges of the District Court of Appeal of Florida, Fourth District, has ever been made by the Petitioners in over two and a half years since they heard the case. Further, no objection has been filed to any of the Justices of the Supreme Court, even though almost a year has elapsed since oral argument in this cause. The Petitioners appear to have merely awaited the Judgment, and did not like the decision and began attacking anyone and everyone.

4. As it relates to the Affidavit under oath of Charles H. Carlton filed in this cause in which he stated that Errol S. Willes went to the District Court of Appeal of Florida, Fourth District, and talked to some of the Judges at the time of oral argument, I argued the case that day and can state unequivocally that Errol S. Willes was not at the District Court of Appeal of Florida, Fourth District, nor to my knowledge was within Palm Beach County.

I hope the above is appropriate, and if more information is needed, I would be pleased to supply it upon request.

My attempt to be professional, ethical, and in good taste prevents me from fully stating my utter contempt for the document filed herein.

/s/ Robert Jackson
Jackson & Clem, P.A.
Post Office Box 2397
Vero Beach, Florida 32960
Attorneys for Respondent

Sworn to and subscribed before
me at Vero Beach, Florida, on
this 29th day of March, 1979.

/s/ Paula L. LaPorte
Notary Public
State of Florida at Large

My Commission Expires: 7/6/81

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to B. K. ROBERTS of the Law Firm of Roberts, Miller, Baggett, LaFace, Richard & Wiser, Post Office Box 1752, Tallahassee, Florida 32302; RAYMOND E. FORD, Post Office Box 3307, Fort Pierce, Florida 33450; JOHN T. BRENNAN of the Law Firm of Brennan, McAliley, Hayskar & McAliley, Post Office Box 3779, Fort Pierce, Florida 33450; ALBERTA CARLTON HAYES, Post Office Box 1781, Fort Pierce, Florida 33450; REUBEN W. CARLTON, Route 1, Box 714, Fort Pierce, Florida 33450; and, CHARLES H. CARLTON, 1118 Sunrise Boulevard, Fort Pierce, Florida 33450, this 29th day of March, 1979.

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